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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN [illegible] HAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-19) is reported at 527 F.2d 990. The opinion of the district court (Pet. App. A-1 to A-43) is reported at 376 F. Supp. 264.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1975. The petition for a writ of certiorari was filed on January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial, in violation of the Sixth Amendment.

2. Whether the evidence showed that petitioner committed a crime against the United States.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371.[1] He was sentenced to three years' imprisonment and a $10,000 fine. The court of appeals affirmed.

As summarized by the court of appeals (Pet. App. B-2 to B-5), the evidence showed that in return for a payment of $125,000, petitioner conspired to defraud his immediate employer and the United States by approving the fraudulently-inflated cost claims of a foreign subcontracting firm employed on a construction project financed by the United States.

Through the Agency for International Development ("A.I.D."), the United States loaned the Republic of Vietnam $17.5 million to help finance a new water system for the Saigon metropolitan area. The loan agreement gave that agency extensive supervisory power over the project, including the right to approve all contractors and all cost-overrun settlements. From 1961 through 1967, petitioner was employed by the American general contractor, Hydrotechnic Corporation, as an engineer on this project (Pet. App. B-3, B-19).

Hydrotechnic subcontracted a portion of the construction to a French corporation, Les Etablissements Eiffel, and assigned petitioner to supervise Eiffel's operations. The three other indicted coconspirators were employees of Eiffel (Pet. App. B-3 to B-4).

When construction of the project was completed in 1966, Eiffel submitted a fraudulent claim for a purported

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[1]Three coconspirators have been indicted, but are not United States citizens and have not been arrested (Pet. App. B-2).

$5.5 million cost overrun to Hydrotechnic. Petitioner and the three Eiffel employees had agreed in writing to attempt to obtain an inflated allowance on this claim (Pet. App. B-4). Petitioner agreed to approve all documents submitted by Eiffel to substantiate its claim and to inform indicted coconspirator Melloni, director of Eiffel's Saigon operations, of the progress of the claim. In return, petitioner was to receive payment based upon the amount of the claim eventually allowed (*ibid.*).

In support of this plan, the invoices submitted to document the claim were altered to make Eiffel's expenses on other contracts appear as charges against the United States-financed project (*ibid.*). Government witness Duong Xuan Lang, Melloni's personal secretary, testified that she typed all confidential documents relating to the fraudulent scheme, including the agreement among the conspirators, and participated in the alteration of the invoices submitted to verify Eiffel's claimed cost overruns (Pet. App. B-13).

After the Eiffel claim had been submitted, the South Vietnamese government hired an accounting firm at A.I.D. expense to verify the cost figures. Petitioner was assigned to assist the auditors with those items requiring application of engineering expertise. On the basis of that audit, an arbitration panel consisting of coconspirator Melloni and representatives of the Vietnamese government and Hydrotechnic allowed Eiffel approximately $2.3 million of its claim (Pet. App. B-4).

The South Vietnamese government paid this obligation directly because the United States' loan funds had by then been exhausted. On October 2, 1967, it deposited $2.3 million in Eiffel's account with the Chase Manhattan Bank in New York City. On that day, coconspirator Vallee directed that $538,000 of the deposit be transferred to the Chase Manhattan account of Eiffel employee

Theophile Siauve, another of the indicted coconspirators. Virtually all of those funds were then transferred from Siauve's New York account to two secret accounts in the Union Bank of Geneva, Switzerland (Pet. App. B-5). Of that amount $125,000 was transferred to petitioner's account in that bank (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 14-17) that the 17-month period between his arrest in May 1973 and his trial in October 1974 violated his right to a speedy trial.[2] In *Barker* v. *Wingo*, 407 U.S. 514, 530-533, this Court specified four factors to be considered in determining whether a person has been deprived of this right: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. None of these factors alone, however, is determinative. *Id.* at 533. Thus, that petitioner asserted his right to a speedy trial is not dispositive.

Upon balancing these considerations, the court of appeals correctly determined that the delay here did not violate petitioner's Sixth Amendment right. Petitioner relies primarily upon the length of the delay. But in *Barker*, the Court noted that a greater delay is permissible in a "serious, complex conspiracy charge" than in an ordinary street crime. *Id.* at 531. It is not disputed that this case involved a complex international conspiracy with difficult problems of proof.

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[2]The court of appeals correctly considered only the delay between petitioner's arrest and trial in assessing his speedy trial claim. As petitioner concedes (Pet. 6), he did not even know that he had been indicted until his arrest in May 1973. He was subjected to neither restraint on his liberty nor public accusation before his arrest; therefore, none of his Sixth Amendment interests was implicated during that period. See *United States* v. *Marion*, 404 U.S. 307.

Petitioner also attacks the justification offered by the government for the delay (Pet. 17-19). The court of appeals found that 13 months of the delay were attributable to the necessity of obtaining the deposition of an officer of the Swiss bank to authenticate the records of petitioner's private account, including the $125,000 deposit.[3] Of the remaining four months, three were found attributable to the unavailability of a major government witness and one to the prior commitments of petitioner's counsel (Pet. App. B-15 n. 9).[4]

a. The court of appeals observed (Pet. App. B-9) that the circumstances which surrounded the obtaining of the authenticating deposition under 18 U.S.C. 3491-3494 "were indeed extraordinary and presented both legal and diplomatic problems." The government conducted delicate negotiations through diplomatic channels[5] to arrange a procedure that would allay the bank's fears of violating Swiss law and would accommodate the dif-

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[3]This deposition was necessary so that the records might be admitted into evidence at trial under the Business Records Act, 28 U.S.C. 1732.

[4]The court of appeals properly rejected petitioner's assertion (Pet. 18) that much of the delay was due to the government's failure to negotiate for the taking of the deposition in the period between his indictment and his arrest, finding that under the circumstances of this case, that procedure would have been impossible (Pet. App. B-10 n. 7).

[5]At least part of the delay in the negotiations resulted from the government's attempt to honor petitioner's demand that he be permitted to confront the bank witness in person. After arrangements had been completed to pay the travel expenses of petitioner and his attorney to Switzerland, to provide petitioner a temporary restricted passport, and to prevent him from recrossing the Swiss frontier under that passport without authorization, petitioner waived his right to attend the deposition (Pet. App. B-9; Pet. App. A-9 to A-13).

ferences in the two countries' legal systems.[6] Both courts below found that "[t]here is no suggestion that the government has done anything other than to strive mightily to take the essential Swiss deposition at the earliest possible time * * * " (Pet. App. B-11; Pet. App. A-8).

b. The second period of delay resulted from the inability of an important government witness, Duong Xuan Lang, to travel from South Vietnam to the United States for the scheduled June 1974 trial because she was then eight months pregnant. The prosecution considered Lang an essential witness because, as executive secretary to coconspirator Melloni, she had typed the conspiracy agreement and had considerable knowledge of the activities of the conspirators (Pet. App. B-13). Accordingly, the government moved to continue the trial date until September 1974. Petitioner's counsel had previous commitments in that month, however, and the trial was continued to, and commenced on, October 13, 1974 (*id.* at B-11).

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[6]The court of appeals summarized some of these difficulties as follows (Pet. App. B-9 to B-10):

> Because Swiss law severely restricts the conduct of foreign judicial proceedings on Swiss soil, special permission had to be negotiated for the American consul to take the deposition. In addition, bank officials were reluctant to cooperate for fear of violating Swiss bank secrecy laws. Other misunderstandings arose because of differences in the two nations' laws. Swiss law has no counterpart to the right to confront witnesses; it has no hearsay rule and thus does not require the type of business record authentication necessary under American law. These and other problems were manifested when the deposition was finally taken on January 29, 1974. The witness from the bank refused to answer certain questions and requested the assistant United States attorney be excluded from the proceedings. Additional delay was caused when the witness refused to sign the reporter's transcript of the deposition, * * * due to fear of violating Swiss criminal laws having no American equivalent.

As this Court stated in *Barker* v. *Wingo*, *supra*, 407 U.S. at 531, "a valid reason, such as a missing witness, should serve to justify appropriate delay." Although Lang's testimony may not have been absolutely essential to the government's case, the court of appeals correctly found that her testimony was "certainly 'material to the government's case' " (Pet. App. B-13).

None of the other key government witnesses was a resident of the United States, and most had to testify through interpreters. Many of them also had been involved in prior criminal activities. The court of appeals correctly noted that the government could not predict in advance which witnesses would attend the trial or whether the jury would credit their testimony (Pet. App. B-13 to B-14). Under these circumstances, the trial court was fully justified in delaying the start of the trial for a reasonable time in order to obtain the testimony of this important witness.

Finally, petitioner does not contend, and the record does not show that the delay impaired his ability to present his defense.[7] Although petitioner may have experienced some personal anxiety or inconvenience in pursuing his profession,[8] this element of prejudice is less important in the overall balancing process than the

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[7]Nor was petitioner subjected to oppressive pretrial incarceration. He was in custody for thirteen days after re-entering the United States but ultimately was released on $5,000 bond.

[8]Although petitioner's passport was revoked after his arrest, he does not argue that the revocation was related to the length of the delay or that his passport would have been returned at an earlier date had his trial not been continued.

Petitioner also suggests (Pet. 17) that the length of the delay was prejudicial to him because he was suffering from cancer. But as petitioner himself testified (Tr. VII, 92, 102), he has experienced no further complications from that disease since undergoing operations for removal of a cancerous tumor in 1967 and 1968.

possibility of impairment of the defense. *Barker* v. *Wingo, supra*, 407 U.S. at 532; see, *e.g., United States* v. *DeTienne*, 468 F.2d 151 (C.A. 7), certiorari denied, 410 U.S. 911.

Considering all the circumstances, the court of appeals properly held that the government had discharged its constitutional duty to make a diligent, good-faith effort to bring petitioner to trial. See *Moore* v. *Arizona*, 414 U.S. 25, 26; *Smith* v. *Hooey*, 393 U.S. 374, 383; *Trigg* v. *State of Tennessee*, 507 F.2d 949 (C.A. 6), certiorari denied, 420 U.S. 938; *United States* v. *Joyce*, 499 F.2d 9 (C.A. 7), certiorari denied, 419 U.S. 1031; *United States* v. *Perez*, 489 F.2d 51 (C.A. 5), certiorari denied, 417 U.S. 945.

2. Petitioner also contends (Pet. 20) that the evidence failed to prove a crime against the United States. He argues that no function of the United States government was impeded by payment of the false claim and that the fraud was perpetrated solely on the Republic of Vietnam. He urges that the United States had no more than a paternalistic interest in the project once its loan funds had been exhausted (Pet. 24).

The court of appeals correctly rejected this argument (Pet. App. B-18 to B-19):

> The United States clearly had a lawful function in connection with the Eiffel cost overrun claim. The United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste. See

United States v. *Thompson*, 366 F.2d 167 (6th Cir. 1966), *cert. denied*, 386 U.S. 945. Pursuant to this interest the United States retained extensive supervisory powers in the loan agreement. Through A.I.D. it had the right of approval of the Eiffel cost overrun settlement. The United States paid for the audit and it had a right to have the audit conducted free from fraud. The United States was exercising a lawful government function and appellant's conduct was "calculated to obstruct or impair its efficiency and destroy the value of its operations." *Haas* v. *Henkel*, [216 U.S. 462, 479]. This is fraud on the United States under 18 U.S.C. §371 as charged in the indictment.[9]

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[9]Neither *Lowe* v. *United States*, 141 F.2d 1005 (C.A. 5), nor *Langer* v. *United States*, 76 F.2d 817 (C.A. 8), upon which petitioner relies, conflicts with the decision below. In *Lowe*, the court held that the mere fact that the United States reimbursed an independent contractor for its salary expenses did not transform a misrepresentation to that company into a matter within the jurisdiction of a federal agency, as required by the statute under which an employee of the company was charged with fraud. There, the subject matter of the alleged fraud was within the exclusive domain of the intermediate company, while in the instant case, the United States retained extensive supervisory power over the completion of the project, including the right to approve payment of cost overruns.

In *Langer*, the court held that an indictment alleging a conspiracy to require employees disbursing federal funds to kickback 5 percent of their salaries to a state political organization charged a conspiracy to defraud the United States. The case was remanded for a new trial, however, on the ground of insufficient evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted t the petition for a writ of certiorari should be denied.

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